No. 324

Supreme Court of the United States

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY and WABASH RAILROAD COMPANY, *Appellants*,

v.

MISSOURI STATE TAX COMMISSION; HUNTER PHILLIPS; HOWARD L. LOVE; J. RALPH HUTCHINSON, Members of the Missouri State Tax Commission, and J. R. TOWSON, Secretary of the Missouri State Tax Commission, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR APPELLANTS

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

CHARLES L. BACON
FREDERICK BEIHL
915 Grand Avenue
Kansas City, Missouri 64106

JAMES E. CARR
MELVIN J. STROUSE
DAVID R. GOODE
Norfolk & Western Railway Company
Roanoke, Virginia 24011

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING
SHOOK, HARDY, OTTMAN, MITCHELL & BACON
CHRISTOPHER S. BOND

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the Missouri State Tax Commission (A. 52) is not officially reported.[1] The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (A. 69) is not yet reported.

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[1] Citations to the portions of the record that are reprinted in the appendix are cited (A. 1, *et seq.*); citations to other parts of the record are cited (R. 1, *et seq.*).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on December 30, 1966. (A. 68). A timely motion for rehearing was denied on February 13, 1967. (A. 2). A notice of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967. (A. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This Court noted probable jurisdiction on October 9, 1967.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3, of the United States Constitution provides:

> "The Congress shall have Power * * *
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The XIV Amendment, section 1, of the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Section 151.060(3) of Vernon's Annotated Missouri Statutes (1952) (hereinafter V.A.M.S.) provides in its part most pertinent to this case:

> "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such

weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 151.060 and sections 138.420, 147.010, 151.010, 151.020, other relevant Missouri statutory provisions, are set out in full in a section appended to this Brief. (Pp. 53-57, *infra*).

QUESTIONS PRESENTED

Section 151.060(3) of the Missouri statutes prescribes the method of assessing the rolling stock of interstate railroads for the purpose of ad valorem taxation. The ratio of the miles of main and branch line road operated in Missouri to the railroad's total such road mileage is applied to the value of the railroad's entire complement of rolling stock. On October 16, 1964, appellant Norfolk & Western, which did not previously operate in Missouri, became the lessee of all the properties of appellant Wabash, which had tracks and operations in Missouri. For the following year, as of January 1, 1965, an assessment for rolling stock was made against the Norfolk & Western. This assessment was based upon applying to the value of the entire Norfolk & Western fleet, owned or leased, the ratio of the leased road mileage in Missouri to total Norfolk & Western system mileage.

The questions presented are these:

1. Whether, in its application to these appellants, section 151.060 is repugnant to the Constitution of

the United States in that it lays an undue burden upon or discriminates against interstate commerce in violation of the commerce clause, Article I, section 8, or deprives them of property without due process of law in violation of the Fourteenth Amendment because in such application it results in an assessment of railroad rolling stock for Missouri property taxation purposes greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

2. Whether the use by the Missouri State Tax Commission solely of a mileage ratio formula in assessing the value of the appellants' rolling stock for Missouri property tax purposes contravenes the Constitution of the United States by laying an undue burden upon or discriminating against interstate commerce in violation of the commerce clause, Article I, section 8, or by depriving these appellants of property without due process of law in violation of the Fourteenth Amendment because the use of the formula results in an assessment greatly in excess of the taxable value of the appellants' rolling stock actually in Missouri on tax day and during the preceding year.

STATEMENT

The appellants are interstate railroads. On October 16, 1964, appellant Norfolk & Western, with the approval of the Interstate Commerce Commission,[2] acquired all the properties of appellant Wabash under a long-term lease. (A. 5; Ex. 41; R. 23).

The Norfolk & Western, a Virginia corporation, has been and still is predominantly a coal-carrying railroad

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[2] Norfolk & Western Ry. and New York, C. & St. L. R.R. Merger, 324 I.C.C. 1 (1964).

with operations centered in the eastern part of the country. Its coal traffic moves principally from mines in Virginia, West Virginia and Kentucky to the seaboard, the manufacturing centers of the East and steel mills in the Great Lakes area. Until the Norfolk & Western acquired the Wabash properties by lease and at the same time, in a related transaction, merged with the New York, Chicago & St. Louis Railroad Company, known as the Nickel Plate, its operations did not extend west of Cincinnati. (A. 15-16; Ex. 3; R. 43).

The Wabash is an Ohio corporation. At the time it leased all its properties to the Norfolk & Western, it was engaged in the carriage of general merchandise on a route that extended from Buffalo to Kansas City. It had approximately 620 miles of road in Missouri upon which it operated trains. (A. 11-15; Ex. 3; R. 43; Ex. 30; R. 13).

As lessee of all of the properties of the Wabash, the Norfolk & Western became liable for the ad valorem taxes on such property in Missouri and elsewhere. Subsequently, as of January 1, 1966, the Norfolk & Western purchased the Wabash rolling stock that it had previously leased. It continues to lease the Wabash's fixed property.[3]

The question in this case arises from the assessment by Missouri of the rolling stock of the combined rail-

[3] By the terms of the lease the Norfolk & Western obligated itself to pay all taxes on the leased property. (Ex. 41, R. 23). By V.A.M.S. § 151.010 all property "owned, hired or leased by any railroad" is made subject to taxation. At one point in this proceeding appellants urged that the Wabash should be treated as a separate entity in the computation of the tax on its rolling stock. The point was abandoned and in any event would not be available to appellants in tax years following the outright purchase by the Norfolk & Western of the Wabash rolling stock.

roads for property tax purposes. Specifically at issue is the assessment for 1965, the year following the Norfolk & Western's lease of the Wabash properties. But the question recurs with each yearly assessment, since the Missouri State Tax Commission has followed the same method in assessing appellants' property in 1966 and 1967.

By the use of a mileage proportion, which is prescribed in its governing statute as a method of assessing an interstate railroad's rolling stock, the Tax Commission in 1965 assessed the rolling stock of appellants in Missouri at nearly $20,000,000. This is almost three times the taxable value of the average amount of the carriers' rolling stock in Missouri at any relevant time and more than twice what the Wabash was assessed for rolling stock in the previous year, even though there had been no change of any consequence in the operations or in the number of locomotives and cars in Missouri. (See pp. 8-12, *infra*).

The method of assessment that the Tax Commission used is described in section 151.060(3) of the Missouri statutes, which provides that

> "when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the . . . commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Acting pursuant to the statute, the Tax Commission first determined the value of all rolling stock owned or

leased by the Norfolk & Western as of the tax day, January 1, 1965. This determination was made by totaling the original cost, less accrued depreciation at 5 per cent a year up to 75 per cent of cost, of each locomotive, car and other piece of mobile equipment. A similar determination is made every year for every interstate railroad operating in Missouri.

The figure thus determined for the Norfolk & Western's entire fleet, $513,309,877, was based solely on the appellants' data, which the Commission accepted without question. The Commission then applied to the total value a factor of 47 per cent, which was used by it as an "equalizing factor" for all railroads and utilities in 1965. The resulting figure, $241,255,643, is what is termed the "depreciated, equalized value" of the Norfolk & Western's entire rolling stock. Property other than that of railroads and utilities is assessed in Missouri by local assessors at some fraction of its value, typically less than 47 per cent, and the equalization factor is intended to yield a comparable assessed value for railroad and utility property. The Commission found, again from data supplied by the appellants, that 8.2824 per cent of all the main and branch line road (excluding second tracks and side tracks) owned, leased or controlled by the Norfolk & Western was within Missouri. This percentage was applied to the overall depreciated, equalized rolling stock value. The resulting figure was $19,981,757. Fixed property, which is valued without resort to the mileage formula, was assessed at $12,177,597, and no question is raised concerning the assessment of such property. The Commission deducted from the sum of these two figures $860,415, representing what it calls an "economic factor" that is allowed to all railroads

in varying amounts and that had been allowed to the Wabash in each of the three preceding years in exactly the same amount. Thus, the total assessed valuation was $31,298,939. (A. 4-6, 52-57).

After notice was received of an assessment in this amount, the appellants filed with the Commission a request for adjustment and equalization of their assessment and asked for a hearing. They challenged the assessment of rolling stock (but not of fixed property) on state law grounds and also on the ground of its repugnance to the federal Constitution. (A. 6-9, 54). A hearing was held before the Commission, and the parties stipulated that the assessment was arrived at in the manner described above. (A. 4-6). Appellants then presented evidence in support of their position that, as applied in this case, the mileage proportion resulted in a valuation of rolling stock so grossly in excess of the value of rolling stock actually in Missouri at any relevant time as to violate the commerce and due process clauses. This evidence, which was in the form of testimony of two officials of the Norfolk & Western and largely statistical exhibits, was uncontradicted. It showed a gross disparity between the assessment made by the Commission and the value of the cars and locomotives owned or leased by the Norfolk & Western that on an average were in Missouri. Counsel for the Commission, taking the view that the statute permitted only the mechanical application of the mileage proportion, objected to most of appellants' evidence as irrelevant to the Commission's duty. (*e.g.*, A. 9-10, 11-13, 25, 36-37, 39, 42).

One major part of appellants' case consisted of the results of studies of cars and locomotives actually in Missouri on January 1, 1965, and on random days in

1964. (See A. 38-50). One exhibit showed that, at 47 per cent of cost less accrued depreciation, *i.e.*, valued in the same way as the Tax Commission valued the entire Norfolk & Western fleet, the rolling stock owned or leased by the Norfolk & Western actually in Missouri on January 1, 1965, was worth only $7,628,297 rather than nearly $20,000,000. (A. 40-42; Ex. 25; A. 40, 100). This is 3.16 per cent, not 8.2824 per cent, of the depreciated, equalized value of the Norfolk & Western fleet. The number of locomotives and cars in Missouri represented 2.71 per cent, not 8.2824 per cent, of the total units of Norfolk & Western rolling stock. (A. *Ibid;* Ex. 40; R. 23). Other exhibits in the series demonstrated that tax day was not atypical: On December 1, 1964, the depreciated, equalized value of rolling stock owned or leased by the Norfolk & Western in Missouri was $7,192,575 (Ex. 29; A. 44, 104), and on other random days during 1964 prior to the lease—April 1, July 1, October 1—the figures for Wabash rolling stock were $5,891,388, $7,102,891 and $7,268,464 (Exs. 26-28; A. 44, 101-03). The average of all five figures was $7,014,723.

The great preponderance of the rolling stock that was in Missouri on January 1, 1965, both by units and by value, was that owned by the Wabash; no Norfolk & Western-owned locomotives, passenger cars or units of work equipment were in Missouri on that day. (A. 22-23; R. 90-91, 94-95). Some Norfolk & Western freight cars were in the state. They were few in number, however, and there was no increase in the number of cars owned by the Wabash, the Norfolk & Western, the Nickel Plate and the Pittsburgh & West Virginia Railway (whose roadbed and rolling stock were also leased by the Norfolk & Western effective October 16, 1964) on the Wabash's line in Missouri from the period before the Wabash lease became effective to the period

after it became effective. (Ex. 5; R. 54, 87; A. 26-27; Ex. 14; A. 26, 93).

This reflects the fact that the acquisition of the Wabash properties made no significant change in the operations of either the Norfolk & Western or the Wabash. The overall purpose of the acquisition, of the merger into the Norfolk & Western of the Nickel Plate, and of the lease of the properties of the Pittsburgh & West Virginia was more to diversify the business of the Norfolk & Western than to provide the opportunity for an integrated through movement of traffic. (A. 11-15). There was no change in rail operations in Missouri except that some Wabash cars were routed through Hannibal, Missouri, instead of St. Louis. The Wabash's general merchandise hauling business continued as before. (A. 15).

Prior to these transactions, the Norfolk & Western was unique among the railroads of the United States in its emphasis upon the carriage of coal. (A. 15-16). More coal is loaded on the line of the Norfolk & Western than on the line of any other railroad in the country. (A. 15). In 1964, 70 per cent of the Norfolk & Western's revenue was from coal traffic. (A. 15). The Norfolk & Western's fleet of rolling stock is therefore comprised very largely of equipment—special locomotives and hopper cars—that is used to carry coal from mines in Virginia, West Virginia and Kentucky to points on the eastern seaboard and the Great Lakes. Scarcely any of that equipment ever enters Missouri. None of the coal from the eastern states is destined for Missouri, and less than .003 of all Norfolk & Western shipments of coal from those states could even have gone through Missouri. (A. 28-30; Ex. 17; A. 29, 95).

In this coal mining region special locomotives, designed for pulling heavy coal trains on grades and equipped with dynamic brakes for handling those trains, are needed. Since locomotives today are used principally in combination, except on local trains, and since these special coal-hauling locomotives cannot be so used with the kind of locomotives owned by the Wabash, the Norfolk & Western's special locomotives are not used in Missouri. (A. 19-21, 23; Ex. 10; A. 21).

The Norfolk & Western owned as of tax day almost 100,000 freight cars, 63,989 of which were coal hopper cars. (Ex. 40; R. 23; Ex. 12; A. 24, 91; Ex. 18; A. 32, 96). These hopper cars were used, of course, primarily in the eastern coal mining regions. Only 163 of these hopper cars were in Missouri on tax day, either on the line of the Wabash or that of some other railroad. (A. 26-27; Ex. 14; A. 26, 93; Ex. 19; R. 89, A. 97). And tax day was not unusual in this respect. (*Ibid*). As pointed out above, scarcely any Norfolk & Western coal mined in Virginia, West Virginia or Kentucky is shipped to points west of the Mississippi. (P. 10, *supra*). Moreover, special rules of the Association of American Railroads issued under authority of the Interstate Commerce Commission require that Norfolk & Western hoppers that go off line east of the Mississippi be returned as promptly as possible to the coal mining regions of the East. This means that Norfolk & Western hoppers that are unloaded in the East cannot lawfully enter Missouri under the control of other railroads. (A. 17-18; Ex. 6; A. 17, 88).

The concentration of traffic and equipment in the East was reflected in the relative density of traffic in Missouri as against traffic over the entire Norfolk & Western system. There is a close relationship between

traffic density in a given area and the amount of rolling stock that on an average is present in that area. A study of traffic density, as measured by ton miles of freight per mile of road, showed that on the Wabash lines in Missouri traffic density was only 54 per cent of what it was on the Norfolk & Western system as a whole. (A. 36-38; Ex. 24; A. 51, 99).

Finally, the appellants showed that, if the Commission had applied the mileage proportion to the Wabash system and the Wabash properties rather than to the Norfolk & Western system and properties, the assessment would have been $10,103,340. (A. 36). The assessment against the Wabash for rolling stock was $9,177,683 the previous year. (A. 36). The assessment of fixed properties, which are assessed without regard to the mileage proportion, did not change significantly from 1964 to 1965, going from $12,092,594 in the hands of the Wabash in 1964 to $12,177,597 in the hands of the Norfolk & Western in 1965. (A. 5, 36).

The hearing at which the foregoing facts were brought out was held on June 23, 1965. The Commission on July 6 entered its decision making final the assessment it had originally proposed. (A. 57). The Commission first recited that it had applied the mileage proportion as described above. It then described its procedures; paraphrased appellants' contentions; made the irrelevant point that it valued the property of railroads and utilities differently from the way local assessors valued other property; paraphrased the applicable statutes, including the mileage proportion statute; asserted that the proportion is a constitutional means of getting at the value of the rolling stock of any interstate railroad in Missouri and was used

uniformly with respect to all interstate roads in Missouri, and finally stated the bare conclusion that appellants' evidence, which was nowhere discussed let alone analyzed, did not show that the assessment of its rolling stock "was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of [appellants] . . . ." (A. 52-57). Appellants, pursuant to Missouri procedure, filed in the Circuit Court of Cole County a petition for review. (A. 58-66). That court sustained the Tax Commission's assessment on the administrative record and did not render an opinion. (A. 66-67). On appeal, the Supreme Court of Missouri stated that the question was "whether Missouri's method, . . . valid on its face, meets the test of reasonable or fair and workable apportionment in its application to N & W in this case." (A. 78-79). The Supreme Court thought that its test was met because the evidence submitted by appellants did "not recognize any justified enhanced or augmented value to the portion [of rolling stock] actually in Missouri brought about by being merged into the entire N & W system." (A. 83).

SUMMARY OF ARGUMENT

I

An interstate enterprise is subject to taxation by a state other than its state of domicile on only that part of its property which is regularly within the state. In applying this proposition to the operating equipment of interstate carriers, this Court has declared that the state may tax only that fraction of equipment, although it may be ever-changing in content, that is habitually present within the state's borders. The mileage basis of apportioning rolling stock, used by Missouri here,

is one method of determining that fraction and has been sanctioned by this Court for use in certain circumstances. *E.g., Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1891). It assigns to the taxing state the percentage of the carrier's rolling stock that corresponds to the percentage of the carrier's track or road within the state; it rests, therefore, on the premise that "the rolling stock is substantially evenly divided throughout the railroad's entire system . . . ." *St. Louis Southwestern Ry.* v. *State Tax Comm'n,* 319 S.W.2d 559, 562 (Mo. 1959). Where that premise fails as it did here, the mileage proportion cannot validly be used, for it results in unconstitutional taxation of out-of-state property.

II

In this case the premise for valid application of the mileage proportion failed because the rolling stock was concentrated much more heavily outside of Missouri than in it: (1) The assessment overstated by nearly 3 to 1 the value of the Norfolk & Western's fleet actually in Missouri on tax day and other representative dates; (2) traffic density, a reliable indicator of the presence of rolling stock, was much lower in Missouri than in the system as a whole; (3) the Norfolk & Western's lease of the Wabash properties did not substantially alter the operations of those properties in Missouri, since the heavy Norfolk & Western coal-hauling business in the eastern states did not materially affect Missouri traffic; (4) in the hands of the Wabash the rolling stock would have been assessed under the mileage proportion at only a little more than half of the actual assessment.

In these circumstances, when Missouri assessed the Norfolk & Western's rolling stock pursuant to the mileage proportion it was attempting to tax more than

$12,000,000 of Norfolk & Western property that was regularly located outside the state. Such an attempt violates both the due process and commerce clauses, as this Court has held in similar cases dealing with mileage proportions. *E.g., Wallace* v. *Hines,* 253 U.S. 66 (1920); *Union Tank Line Co.* v. *Wright,* 249 U.S. 275 (1919); *Fargo* v. *Hart,* 193 U.S. 490 (1904). Cf. *Southern Ry.* v. *Kentucky,* 274 U.S. 76 (1927). These cases are of unquestioned authority, reflecting as they do the common-sense proposition that the mileage proportion will yield an irrational result when the premise of a proportionately even distribution of property within and without the taxing jurisdiction does not accord with the facts. The Court has recognized since 1874 that a tax applied to property values developed from application of a mileage proportion whose premise fails as it has in this case "must necessarily fall upon property out of the State." *The Delaware Railroad Tax,* 18 Wall. 206 (1874). And this is forbidden by the Constitution.

III

The principal ground on which the court below rationalized the assessment was that the rolling stock in Missouri had an "enhanced or augmented value" by reason of its inclusion in the larger Norfolk & Western system. This rationale is a misconception of the doctrine, recognized in many decisions of the Court, that a state may tax its fair share of the whole value of an enterprise, even though that share is greater than the value that would be ascribed to tangible assets in the state under a method of assessment that did not have regard to the unitary value of the enterprise. There is nothing in this concept of enhancement that allows a state to do what Missouri did here—to inflate the percentage of the enterprise that it can tax.

The Missouri Supreme Court failed to distinguish its taxing scheme from those of other states that use a mileage proportion to allocate a part of the whole value of interstate enterprises. The Missouri statute, as applied here, is meant only to determine the value of rolling stock as an aggregate of individual units and to allocate to the state a part of that value. The fleet of the Norfolk & Western, like that of all other railroads, was valued at original cost less depreciation; therefore, no enhancement for unitary enterprise value, if any such value existed, was taken into account. The Missouri statute as administered thus differs from the statutes before this Court when it has spoken of enhancement, because those statutes utilized gross receipts, net income or capitalization to value tangible assets. Missouri does not, however, ignore enterprise values; it reaches such values under a franchise tax statute, not here in issue.

Furthermore, even if the railroad property tax statute were also meant to reach enhanced values, it would not be saved in its application in this case. This Court has condemned the use of a mileage proportion to attribute to a state more value than the facts show can fairly be attributed to it in cases where the total value to which the mileage proportion was applied represented total enterprise, or "enhanced," value. *Wallace* v. *Hines*, 253 U.S. 66 (1920); *Fargo* v. *Hart*, 193 U.S. 490 (1904). Finally, another condition for finding enhancement of value—a showing in a "plain and fairly intelligible way that [out-of-state property] adds to the value of the road . . . in the state," *Wallace* v. *Hines, supra* at 69—was not satisfied here, since the coal-hauling operations of the Norfolk & Western did not contribute significantly to the value of property in Missouri.

IV

The nearly 3 to 1 discrepancy between the Missouri assessment and the actual taxable value of rolling stock present in Missouri was enough to satisfy this Court's requirement that a taxpayer prove an assessment to be "grossly excessive." *Norfolk & Western Ry.* v. *North Carolina ex rel. Maxwell,* 297 U.S. 682, 685 (1936). The Missouri Supreme Court's view that the assessment was not grossly excessive will not withstand analysis, for that view rested principally upon a comparison of the proportion of the rolling stock value assessed here with a past assessment against the Wabash. This comparison is meaningless since it deals with assessed values in Missouri in relation to total system values rather than in relation to the actual value of rolling stock habitually present within the state.

There is no substance to other grounds on which the court below sought to sustain the questioned assessment, *i.e.,* that factors other than the mileage proportion were considered and that the Tax Commission may not have believed appellants' evidence. The Tax Commission explicitly followed the mileage proportion mode of assessment in a mechanical manner and adopted to the dollar the result yielded by that course. It took no other factors into account. The suggestion that the Commission may have disbelieved appellants' evidence is fanciful. The witnesses were scarcely cross-questioned, there was no countervailing proof, and the evidence was statistical and therefore subject to ready verification. Indeed, it was similar to the evidence upon which the Commission admittedly relied in making the assessment. In short, appellants' evidence was the "clear and cogent evidence" that this Court has held necessary to invalidate an apportionment. *Butler*

Bros. v. *McColgan,* 315 U.S. 501, 507 (1942). The Commission ignored this evidence, regarding it as irrelevant to the Commission's duty of mechanically applying the mileage proportion. Since constitutional rights are at issue here, this Court is bound to determine what in fact the Tax Commission did below, notwithstanding the state court's attempted explanations.

V

During its long history the mileage proportion used by Missouri here has been recognized to be both inaccurate and unfair. As a consequence, very few states —indeed only a few of those in which the Norfolk & Western operates—continue to use a mileage proportion without modification. Thus, there is no merit to the appellees' argument that railroads, including the Norfolk & Western, would not be prejudiced if every state used a mileage proportion. Since most states have adopted formulas that give some weight to traffic density, the assessment here, if allowed to stand, would result in double taxation of the values not fairly attributable to Missouri. Furthermore, there is an additional risk of double taxation as a result of the power of a state of domicile to tax all rolling stock except rolling stock shown to be habitually present in some particular other state. *Central R.R.* v. *Pennsylvania,* 370 U.S. 607 (1962).

The only burden placed upon the Tax Commission by a judgment of reversal would be a requirement that it consider and evaluate fairly the appellants' evidence and make such adjustments in its assessment as that evidence requires. The Tax Commission need not actually count the cars and locomotives of the Norfolk & Western in Missouri on a particular day,

but when confronted with the results of such a count, it must take those results into account in its assessment when they differ as drastically as they did here from the formula assessment.

ARGUMENT

I. A MILEAGE PROPORTION CAN VALIDLY BE APPLIED TO ASSESS PROPERTY OF AN INTERSTATE RAILROAD ONLY WHEN IT DOES NOT RESULT IN THE ASSESSMENT AND TAXATION OF PROPERTY OUTSIDE THE STATE OR A DISPROPORTIONATE TAX BURDEN ON INTERSTATE COMMERCE.

Missouri unquestionably has power to tax the property of the Norfolk & Western, including its rolling stock, that is regularly within the state's borders even though the property is used in interstate commerce and even though the Norfolk & Western is not domiciled in Missouri. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1891); *Marye* v. *Baltimore & O.R.R.,* 127 U.S. 117 (1888). That power is not challenged here. But just as unquestionably Missouri does not have power either to tax property of the Norfolk & Western that is outside the state or to lay a disproportionately large tax upon the Norfolk & Western because of its out-of-state operations. *Fargo* v. *Hart,* 193 U.S. 490, 499, 502 (1904). It is our contention that Missouri in this case has attempted to do just that by subjecting to its taxing power millions of dollars worth of rolling stock that was not in Missouri and had no taxable relationship to Missouri.

Rolling stock, being constantly on the move, poses a problem for states that attempt to tax it ad valorem; many of the cars and locomotives of the usual interstate railroad are not permanently in any one state. The problem and the constitutional solution were limned

by Mr. Justice Douglas, concurring in *Braniff Airways* v. *Nebraska State Bd.*, 347 U.S. 590, 603 (1954):

> "Property in transit . . . is not subject to an ad valorem tax. Property in transit may move so regularly and so continuously that part of it is always in the State. Then the fraction, but no more, may be taxed ad valorem."

The Missouri statutory provisions that were applied to the Norfolk & Western's tangible property in this case represent an effort to get at "the fraction" of the Norfolk & Western's rolling stock regularly and continuously in Missouri by means of a mileage proportion—a device that this Court has sanctioned, *Pullman's Palace Car Co.* v. *Pennsylvania, supra,* but only under circumstances that were not present here.[4]

Every railroad operating in Missouri is directed to report each year to the State Tax Commission its fixed property in Missouri and the number and value of its locomotives, cars and other items of movable property wherever located. V.A.M.S. § 151.020. On the basis of these reports and such other information as it may call for or otherwise possess, the Commission is directed to assess the railroad's tangible property in Missouri. V.A.M.S. § 151.060(1). In its assessment of the rolling stock portion of that property, the Commission is limited to a proportion of the total value of the carrier's rolling stock that corresponds to the ratio of road mileage in Missouri to the total road mileage of the railroad. V.A.M.S. § 151.060(3).

The propriety of using a mileage proportion as an index to the quantity and therefore the value of rolling

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[4] See also Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Rowley v. Chicago & N.W. Ry., 293 U.S. 102 (1934); Wells Fargo & Co. v. Nevada, 248 U.S. 165 (1918); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897).

stock in Missouri rests on the premise, as the Missouri Supreme Court has stated, that "the rolling stock is substantially evenly divided throughout the railroad's entire system, and the percentage of all units which are located in Missouri at any given time, or for any given period of time, will be substantially the same as the percentage of all the miles of the railroad located in Missouri." *St. Louis Southwestern Ry.* v. *State Tax Comm'n*, 319 S.W.2d 559, 562 (Mo. 1959).[5] Where that premise is valid, the statute accomplishes what it was meant to accomplish, for it then taxes only rolling stock that is regularly inside Missouri.

Where the premise fails as it has here, an attempt to apply the mileage proportion results in an unconstitutional tax on property outside the state's borders. The unconstitutionality of such an attempt is established by repeated decisions of this Court, beginning with a very pointed dictum in *Pittsburgh, C.C. & St. L. Ry.* v. *Backus*, 154 U.S. 421, 431 (1894), and continuing with holdings in *Fargo* v. *Hart*, 193 U.S. 490 (1904), *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919), *Wallace* v. *Hines*, 253 U.S. 66 (1920), and *cf. Southern Ry.* v. *Kentucky*, 274 U.S. 76 (1927), and with declarations of the principle in *Illinois Cent. R. R.* v. *Greene*, 244 U.S. 555, 562-63 (1917), *Rowley* v. *Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934), and *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365-66 (1940). The failure of the premise and the constitutional consequence of that failure are detailed in part II of this Brief, *infra*.

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[5] The statement of the premise for the use of the mileage proportion was quoted in the opinion below. (A. 80). This Court too has held that the validity of a mileage proportion depends upon a roughly even distribution of property throughout a railroad's system. Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 110 (1934); Fargo v. Hart, 193 U.S. 490, 500 (1904).

II. THE MILEAGE FORMULA IS UNCONSTITUTIONAL IN ITS APPLICATION TO THE NORFOLK & WESTERN IN THIS CASE BECAUSE IT BRINGS ONTO MISSOURI'S TAX ROLLS PROPERTY NOT PRESENT IN MISSOURI.

A. The Record Demonstrates a Gross Disparity Between the Value of Norfolk & Western Rolling Stock Actually in Missouri and the Tax Commission's Assessment, as Well as a Lack of Relationship of Rolling Stock Values Appropriated by Missouri To Operations of the Carrier in That State.

In this case the premise for valid application of the mileage proportion to the Norfolk & Western's rolling stock clearly did fail. The appellees do not dispute the fact that the rolling stock owned or leased by the Norfolk & Western was not evenly distributed throughout the railroad's system but was much more heavily concentrated outside Missouri. Moreover, the rolling stock concentrated elsewhere made no contribution to the value of property in Missouri. This we have demonstrated in our discussion of the uncontroverted evidence submitted by the appellants to the Missouri Tax Commission. (See pp. 8-12, *supra*). To summarize:

1. The Tax Commission's assessment was of 8.2824 per cent of the value of the Norfolk & Western's fleet. On tax day only 2.71 per cent of that fleet by units, and 3.16 per cent of it by value, was in Missouri. And tax day was representative of the taxable presence of appellants' rolling stock in Missouri throughout the preceding year. Putting the matter in other terms, the assessment of rolling stock was $19,981,757; on a similar basis of valuation the average value of rolling stock in Missouri on random days, including tax day, was $7,014,723. This disparity approaches 3 to 1.

2. The average mile of track in Missouri was responsible for only slightly more than half of the

traffic of the average mile of track in the system. Thus, the Missouri road was much less densely populated with cars and locomotives than the system as a whole.

3. After all the Wabash properties were leased to the Norfolk & Western, the operations in Missouri continued in much the same way as they had under Wabash management. The Norfolk & Western's business, heavily weighted with the carriage of coal in the eastern part of the United States, continued as it had and did not significantly affect the Missouri operations of the leased Wabash properties. No Norfolk & Western locomotives and very few of its coal hopper cars were in Missouri at any relevant time.

4. In the year before the lease much the same rolling stock of the Wabash as was covered by the 1965 assessment had been assessed at only a little more than $9,000,000, rather than nearly $20,000,000. If the mileage proportion had been applied to the Wabash system alone, rather than to the whole of the Norfolk & Western properties, the post-lease 1965 assessment would have been only slightly more than $10,000,000.

B. Under the Consistent Rulings of This Court the Application of the Mileage Proportion in This Case Is Invalid Under the Commerce and Due Process Clauses.

When Missouri assessed 8.2824 per cent of the Norfolk & Western's rolling stock, despite the fact that only 2.71 per cent of the total Norfolk & Western units and 3.16 per cent of the value of the entire Norfolk & Western fleet was in the state, it was attempting to tax more than 5 per cent of the railroad's rolling stock that was regularly located outside Missouri. This comes to more than $12,000,000 of out-of-state property (at Missouri's assessed value) that the state has placed on its tax rolls.

It is a fundamental principle of constitutional law that the imposition of a tax on out-of-state property violates the due process clause of the Fourteenth Amendment. *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 342 (1954); *Greenough* v. *Tax Assessors,* 331 U.S. 486, 491 (1947). Cf. *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965). It is also clear that "the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar." *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753, 756 (1967). See also *Central R.R.* v. *Pennsylvania,* 370 U.S. 607, 612 (1962); *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U.S. 169, 174 (1949). Under the test for determining whether state action is permissible under the commerce clause, the Missouri assessment scheme also falls, for it lays an unlawful burden on and discriminates against interstate commerce. This is demonstrable by a comparison of how the Missouri assessment scheme, as interpreted by the State Tax Commission in this case, would operate upon an interstate railroad with high traffic density in Missouri and low traffic density elsewhere. The rolling stock of such a railroad would be assessed at an amount less than the value of rolling stock actually in the state. In contrast, roads like the Norfolk & Western with low Missouri traffic density are taxed on their out-of-state property and therefore are discriminated against merely because they have a disproportionately large amount of out-of-state traffic. A clearer burden on interstate commerce is difficult to imagine. See *Nippert* v. *Richmond,* 327 U.S. 416, 431-34 (1946). See also *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33, 45, 48 (1940); *Halliburton Oil Well Cement Co.* v. *Reily,* 373 U.S. 64 (1963).

The principles of the above-cited decisions have been applied to invalidate over-assessments resulting from application of mileage proportions similar to Missouri's. *Wallace* v. *Hines,* 253 U.S. 66 (1920); *Union Tank Line Co.* v. *Wright,* 249 U.S. 275 (1919); *Fargo* v. *Hart,* 193 U.S. 490 (1904).[6] Indeed, in a decision that pre-dates these three the Court described the very facts of the present litigation as one of the "exceptional cases" in which the mileage proportion, then recently held valid on its face in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1891), could not validly be applied:

> "[I]n certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock." *Pittsburgh, C.C. & St. L. Ry.* v. *Backus,* 154 U.S. 421, 431 (1894).

In the earliest of the cases invalidating state assessments, *Fargo* v. *Hart, supra,* the Court found that by using a mileage proportion the state had taken into account out-of-state property that contributed nothing to the value of property within the state—much as the Norfolk & Western's coal-hauling equipment was taken into account here. Mr. Justice Holmes, who spoke for the Court, took the occasion to expand upon the dictum of the *Backus* case and made it clear that a general principle underlay what the Court had said there about "exceptional cases." The principle was that the mileage proportion depends, as we have noted above, on the assumption "that the different parts of a line are about equal in value," and where that is not so the result of taxing according to a mileage proportion is to tax property outside the state. 193 U.S. at 500. The

[6] See also Southern Ry. v. Kentucky, 274 U.S. 76 (1927).

Court was dealing, significantly, with a statute that had been upheld in *American Express Co.* v. *Indiana*, 165 U.S. 255 (1897). It nevertheless condemned the particular assessment that was at issue as "an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States." 193 U.S. at 502.

In the *Union Tank Line* case a mileage proportion (based upon miles of track over which cars were run in the taxing state and throughout the country) was applied to the rolling stock of a company that rented tank cars to shippers. The showing of the tank car company was quite like that of the appellants here—a demonstration of a marked discrepancy between the assessment yielded by application of the mileage proportion to the aggregate value of a fleet of cars and the value of the average number of cars in the state. The Court held "that to permit enforcement of the proposed tax would deprive [the tank car company] of property without due process of law and also unduly burden interstate commerce." 249 U.S. at 283.[7]

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[7] In Union Tank Line Co. v. Wright, 249 U.S. 275 (1919), the Court, over a dissent, discounted as a dictum and disapproved what had been said in Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), as to the general validity of mileage proportions. Any intimation that the *Pullman* case had been overruled was dispelled by Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949), if not earlier. See Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 365 (1940). But *Union Tank Line* remains authority for the more limited proposition for which appellants contend here. Indeed, the Missouri Supreme Court has recently recognized it as such. St. Louis Southwestern Ry. v. State Tax Comm'n, 319 S.W.2d 559, 561 (1959). See also Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 991-92 (1962).

In *Wallace* v. *Hines, supra,* under a North Dakota statute the ratio of a railroad's North Dakota main track mileage to total main track mileage was applied to the value of its stocks and bonds. The Court held, on an appeal from the grant of a preliminary injunction, that on the allegations of the railroad's complaint "the circumstances are such as to make that mode of assessment indefensible." 253 U.S. at 69. There were two reasons. One was that the alleged facts belied the necessary assumption that every mile of North Dakota track had approximately the same value as every other mile of the railroad's system. The other was that it appeared, again as in the present case, that the state had taken into account very large amounts of values that did "not affect the North Dakota part of the road." *Id.* at 70.

Southern Ry. v. *Kentucky,* 274 U.S. 76 (1927), like the preceding cases, struck down an overassessment resulting from the application of a mileage proportion. Kentucky computed its franchise tax by capitalizing the net operating income of railroads and by allocating to the state the percentage of that capitalized sum that corresponded to the percentage of the railroad's trackage within the state. The taxpayer, however, proved that the average net operating income per mile of track in Kentucky was much less than on the system as a whole, much as the Norfolk & Western proved here that the concentration of its rolling stock in Missouri was much less than on its system as a whole. The conclusion of the Court is therefore particularly relevant here:

> "[A]s the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount ad-

> judged . . . was arbitrarily excessive and included values of system property beyond the limits of Kentucky." 274 U.S. at 84.

The authority of this line of cases is unimpaired. In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 175 (1949), where the sanction given for the use in proper circumstances of a mileage proportion to allocate railroad property was extended to vessels on inland waterways, the Court was at pains to note that the Attorney General of the taxing state had represented that the state statute "was intended to cover and actually covers here, an average portion of property permanently within the state . . . ." In *Rowley* v. *Chicago & N.W. Ry.*, 293 U.S. 102, 110 (1934), the Court declared, citing *Fargo* v. *Hart*, *Wallace* v. *Hines* and the *Union Tank Line* case:

> "Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measurement for apportionment must be condemned as arbitrary."

See also *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365-66 (1940).

The fact is that mileage proportion assessments have been sustained only in cases like *Pullman's Palace Car Co.* v. *Pennsylvania, supra*, *Ott* v. *Mississippi Valley Barge Line Co., supra*, and *Pullman Co.* v. *Richardson*, 261 U.S. 330 (1923), where the challenge was to the very use of the mileage proportion without regard to its fairness in the particular case; or, like *Nashville*,

C. & St. L. Ry. v. *Browning, supra,*[8] and *Adams Express Co.* v. *Ohio State Auditor,* 165 U.S. 194 (1897); where there was no record of exceptional circumstances such as would debar the state from use of the formula; or, like *Rowley* v. *Chicago & N.W. Ry., supra,* and *Pittsburgh, C.C. & St. L. Ry.* v. *Backus,* 154 U.S. 421 (1894), where factors other than the mileage ratio, which by itself would have yielded an arbitrary result, were considered.

In short, the mileage proportion has the advantage of simplicity of application, but simplicity is not always enough where the problem, that of allocating to a state taxable values of an interstate enterprise, is a difficult one to whose solutions exacting constitutional standards are applied. *General Motors Corp.* v. *District of Columbia,* 380 U.S. 553, 561-62 (1965). The common sense of the matter is that a mileage proportion may or may not achieve "the essential aim" of a state assessment statute, which is to ascertain "real values . . . of property within a State. . . ." *Union Tank Line Co.* v. *Wright, supra* at 283. It will do so only when the conditions on which it is premised prevail. When those conditions do not prevail, when rolling stock is heavily concentrated outside the taxing state, the statutory mileage proportion is unconstitutional in its application.

This common-sense point was seen by the Court even before the *Pullman Car* case was decided. In *The Delaware Railroad Tax,* 18 Wall. 206 (1874), a state taxed a domiciliary railroad upon a percentage of its stock determined by the ratio of in-state railroad mileage to total mileage. The ratio of the value of the railroad's property in the state to the value of all

[8] See Nashville, C. & St. L. Ry. v. Browning, 140 S.W.2d 781, 786 (Tenn. 1939).

its property was less than the mileage ratio. While the tax was sustained as that of a state upon a domiciliary corporation, the Court said that, if the tax were regarded as a tax on the railroad's property, as was assumed by the state in argument, it "must necessarily fall upon property out of the State," and—a polite understatement—"there would be difficulty in sustaining the tax." *Id.* at 231. Without more the principle of this nearly century-old precedent, confirmed by repeated decisions over the years, compels reversal of the judgment below.

III. THE DECISION BELOW CANNOT BE SUSTAINED ON THE GROUND THAT IT MERELY RECOGNIZED AN ENHANCED OR AUGMENTED VALUE OF THE ROLLING STOCK.

The court below recognized the authorities we have just discussed and the arguments based on them. It sought to distinguish them with the unexplained statement that what was done here "is not like the situations presented in" this Court's decisions invalidating mileage proportion assessments. (A. 84). Without elaboration, this scarcely seems an adequate answer, and indeed it was not the court's primary answer.

Principally, the court sought to meet these arguments by declaring that Missouri's assessment of the appellants' rolling stock at nearly $20,000,000 while only a little more than $7,000,000 of such rolling stock was in the state on an average day during the relevant year was justified by the fact that "the portion actually in Missouri" had an "enhanced or augmented value . . . by being merged into the entire N&W system." (A. 83). It also spoke of a theory, said to underlie the mileage ratio method of assessment, "that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because

of its connection with, an integrated operational whole . . . ." (A. 79). The appellees have taken up this theme in their motion to dismiss or affirm.

Appellees, as did the court below, dwell at length on enhancement. The fact remains, however, that there is no support either in logic or in authority for the proposition that a state can allocate to itself for tax purposes 8 per cent of an enterprise's property, when only 3 per cent of that property is within the state, on the ground that it merely recognizes the enhanced value of the property within the state caused by its being part of a larger, interstate whole. The court below failed to appreciate this point because it misconceived on several scores the idea of enhancement of value by reason of unity of operation.

One fundamental misconception of the court below related to the kind of taxing statute to which the idea of enhancement is relevant. There are at least two reasons that states assess railroads and other carriers by various formulas rather than by physical valuation. One is to provide a simplified means of determining how much of a carrier's rolling stock is actually in the state and therefore taxable by it. That is the reason for and purpose of the Missouri mileage proportion statute as it has been administered by the State Tax Commission in this and other cases. Enhancement of value, as that idea has been expressed by this Court, is not relevant to such a statute.

The other reason for taxation by formula is to insure that the state subjects to its taxing power its share of the full value of the carrier as a going concern. A simple example, which led to considerable litigation in this Court near the turn of the century,

is that of a tax upon express companies.[9] An express company does not usually have much physical property compared to the volume of its business. Yet, its activities in a state may contribute so much to the entire value of its business that the state is warranted in taxing a substantial part of the total value of the business. See *Adams Express Co.* v. *Ohio State Auditor,* 165 U.S. 194, 220-21 (1897). Thus, statutes were enacted providing for assessing the capital value of express companies according to formulas, including mileage ratios, that purported to measure the proportion of the companies' activities in the state. *Id.* at 221. This mode of assessment allowed the states to get at the going concern values of express companies and thus to tax more than the value of their tangibles in the state, considered as separate items of property.

Mileage proportions have been applied to all of a railroad or a telegraph company's properties, including fixed property, *Pittsburgh, C.C. & St. L. Ry.* v. *Backus,* 154 U.S. 421 (1894); to its capital stock, *Western Union Tel. Co.* v. *Massachusetts,* 125 U.S. 530 (1888); *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1891); and even to its net income, *Norfolk & Western Ry.* v. *North Carolina ex rel. Maxwell,* 297 U.S. 682 (1936).[10] And they have also been applied to aid in the valuation of rolling stock according to

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[9] See Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897); American Express Co. v. Indiana, 165 U.S. 255 (1897); Adams Express Co. v. Kentucky, 166 U.S. 171 (1897); Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897).

[10] In Norfolk & Western Ry. v. North Carolina ex rel. Maxwell, 297 U.S. 682, 685 (1936), the Court said that "mileage may have at times a relation to a tax upon net income which it may not bear to a property tax or even to one upon the value of a franchise."

its revenue-producing ability, as measured by gross receipts. *Pullman Co.* v. *Richardson*, 261 U.S. 330 (1923). A statute using a mileage proportion in any of these ways has a purpose beyond that of merely determining what rolling stock can be attributed to the state, and is aimed at reaching a part of the full value of an enterprise. Such statutes have been approved by this Court when the results they yielded fairly corresponded to the value of the taxpayer's property in the state, *i.e.*, where the values associated with a mile of track were about equal within and without the state. In these situations the state uses a method of valuation or chooses a subject or measure for an apportioned tax that accurately reflects the value of property enhanced or augmented, as this Court has put it, by reason of its being part of an integrated interstate enterprise. *E.g., Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1959); *Pullman Co.* v. *Richardson*, 261 U.S. 330, 338 (1923); *Cudahy Packing Co.* v. *Minnesota*, 246 U.S. 450 (1918); *Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194, 220-26 (1897); *Cleveland, C.C. & St. L. Ry.* v. *Backus*, 154 U.S. 439, 445-46 (1894).

This Court long ago recognized the distinction between the kind of statute to which the Court was addressing itself in these cases, where there are enhanced values, and an ordinary statute for assessing and taxing tangible property:

> "A distinction must be noticed between the construction of a state law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its

scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value." *Adams Express Co.* v. *Ohio State Auditor*, 166 U.S. 185, 221 (1897).

The Missouri taxing statutes that are involved here, as administered by the State Tax Commission, plainly focus upon "horses and wagons." Indeed, the procedures of the Tax Commission do not provide any means whereby any enhanced value, even of rolling stock alone, resulting from its inclusion in a unitary railroad enterprise is or, indeed, can be determined. The point where enhancement or augmentation might enter, if at all, is the point at which the entire fleet of rolling stock is valued before the mileage proportion is applied. If any enhanced or augmented value were to be recognized at that point, techniques different from those that the State Tax Commission used would have to be employed. The statute requires from each railroad a statement showing the total number of units of rolling stock "and the actual cash value thereof." V.A.M.S. § 151.020. Pursuant to this provision, the Commission requires and the appellants (and all other railroads operating in Missouri) supplied data showing units of rolling stock, their cost, and their age so that allowable depreciation could be computed. The Tax Commission merely took the figures supplied by the appellants, and "as in all other railroad assessments" it then took "the original cost of the equipment by the year of acquisition and allow[ed] five percent depreciation per year but with a maximum depreciation of Seventy-five per cent of original cost," to arrive at the value of the Norfolk & Western's entire complement of rolling stock. (A. 53). The Commission then applied the mileage pro-

portion to this value. This process of valuation and allocation at no stage takes account of going concern or other "enhanced" values.

Moreover, there is no reason to doubt that in so administering its governing statute the Tax Commission has correctly construed it. A prime indication that the property tax statute is not intended to reach Missouri's share of the full value of railroads lies in the fact that only rolling stock and not fixed property is allocated to the state by the mileage proportion. This suggests the limited purpose of determining the quantity and thus the value of rolling stock in Missouri. Values associated with the status of a railroad or other business as a unitary enterprise or going concern are otherwise taxed in Missouri. They are reached by the franchise tax provided for in section 147.010 of the Missouri statutes.[11] This provision requires every corporation organized or doing business in Missouri to pay annually a tax on the same proportion of the cor-

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[11] Under prior statutes the Missouri taxing authorities had assessed the franchise or going concern value of railroads. But that was under provisions specifically authorizing the assessment and taxation of franchises and of "all other property" or "any other property" of railroads. Mo. R.S. 1939 §§ 11240-41, 11248. See State ex rel. Hagerman v. St. Louis & E. St. L. Elec. Ry., 279 Mo. 616, 216 S.W. 763 (1919), *aff'd*, 256 U.S. 314 (1921); State ex rel. Hammer v. Wiggins Ferry Co., 208 Mo. 622, 106 S.W. 1005 (1907). Those provisions were repealed when chapter 151 was enacted in its present form in 1945. Mo. Laws 1945, pp. 1825, 1901. The present statute was made to govern the manner of assessing and taxing railroads' "real property, and tangible personal property." V.A.M.S. § 151.010. Such property is returned by a railroad under V.A.M.S. § 151.020, and § 151.060 authorizes the Tax Commission to assess property so returned and "any other *tangible* property"—not "all other" or "any other property" as under previous law.

poration's capital stock plus surplus that its assets inside the state bear to its total assets. Since it acquired the Wabash properties by lease, section 147.010 has been applied to the Norfolk & Western.[12]

Thus, when the Missouri Supreme Court spoke of enhanced values it was attempting to justify the irrational result the Tax Commission obtained in applying a statute to which the concept of enhanced value is foreign. In its references the court utterly misconceived what this Court has meant when it has talked about enhanced value. This can be shown by a discussion of the case the Missouri Supreme Court cited for the key statement of its understanding of the enhanced value theory—*Pullman Co.* v. *Richardson,* 261

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[12] The Missouri Supreme Court has upheld the application of the franchise tax statute to railroads on precisely the same rationale that this Court used in deciding one of the leading cases on enhancement of value, Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897). See, *e.g.*, State ex rel. Missouri Pac. R.R. v. Danuser, 319 Mo. 799, 6 S.W.2d 907 (1928), *cert. denied*, 278 U.S. 631 (1928); State ex rel. Wabash Ry. v. Williams, 284 Mo. 456, 224 S.W. 822 (1920).

From the time the franchise tax statute generally applicable to corporations was enacted in 1917 until chapter 151 took its present form in 1945, there seems to have been the possibility in Missouri of double taxation of the enterprise value of railroads. Indeed, one point in a challenge to the franchise tax statute of 1917 that came to this Court and was rejected, St. Louis-San Francisco Ry. v. Middlekamp, 256 U.S. 226 (1921), was that the statute resulted in double taxation. See 65 L. Ed. at 907. Oddly, on the same day that the *Middlekamp* case was decided, the Court also handed down its opinion in St. Louis & E. St. L. Elec. Ry. v. Missouri ex rel. Hagerman, 256 U.S. 314 (1921), rejecting a constitutional challenge to an assessment under the special Missouri tax on railroad franchises of a part, determined fairly according to a mileage proportion, of the going concern value of a street railroad that operated over a bridge crossing the Mississippi River.

U.S. 330 (1923).[13] That case involved a tax on the property of the Pullman Company measured by gross receipts. In explaining that gross receipts was a proper measure of such a tax the Court made a comment, quoted by the court below, that a state has the power to make a tax "cover the enhanced value which comes to the property in the State through its organic relation to the system."[14] *Id.* at 338. See also *Cudahy Packing Co.* v. *Minnesota,* 246 U.S. 450, 455-56 (1918); *Adams Express Co.* v. *Ohio State Auditor,* 165 U.S. 194, 220-26 (1897). But the references to "organic" or "real values" or the like in these and similar cases were obviously directed to determining the value of property to be allocated and not to allocation of values.[14] Valuation and allocation are quite different things, and neither in *Pullman* nor in any other case has this Court indicated that its concept of enhancement is relevant to the latter.

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[13] "The theory underlying such method of assessment is that rolling stock regularly employed in one state has an enhanced or augmented value when it is connected to, and because of its connection with, an integrated operational whole and may, therefore, be taxed according to its value 'as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system.' Pullman Co. v. Richardson, 261 U.S. 330, 338." (A. 79).

[14] See Railway Express Agency v. Virginia, 358 U.S. 434, 436, 441-42 (1959); Rowley v. Chicago & N.W. Ry., 293 U.S. 102, 109 (1934); Great Northern Ry. v. Minnesota, 278 U.S. 503, 508-09 (1929); Southern Ry. v. Kentucky, 274 U.S. 76, 81-82 (1927); Union Tank Line Co. v. Wright, 249 U.S. 275, 282-83 (1919); U.S. Express Co. v. Minnesota, 223 U.S. 335, 347 (1912); Fargo v. Hart, 193 U.S. 490, 498-99 (1904); Pittsburgh, C.C. & St. L. Ry. v. Backus, 154 U.S. 421, 428-29 (1894); State Railroad Tax Cases, 92 U.S. 575, 608, 611 (1876).

To explain the consequences of the Tax Commission's application of the mileage proportion in this case on the basis of "enhancement" is to confuse the two ideas of valuation and allocation. The court below misapplied the concept of enhancement, which can be considered only at the stage where value is found, to explain what happened in the allocation of values already found. But the fact is that the amount of the assessment against the Norfolk & Western for rolling stock was inflated, not because of any enhancement of value, but because of the failure of what the court below itself recognized was the necessary premise for a rational result under a mileage proportion—the even distribution of rolling stock throughout the railroad's entire system. (See pp. 20-21, *supra*). Thus, on the Missouri Supreme Court's theory only those railroads for which application of the mileage proportion to rolling stock yields inflated and unrealistic values *i.e.*, railroads with proportionately more rolling stock outside the state than within it, are to be charged with any enhanced, unitary enterprise value. This is a blatant discrimination against and burden upon the interstate commerce of such roads. (See p. 24, *supra*).

Even if, therefore, chapter 151 were meant somehow to reach the enhancement of value of rolling stock associated with its being used in the interstate Norfolk & Western system, that fact would not change the proper result of this appeal. The idea of enhancement has never been regarded as a justification for a taxing state's taking into its assessment a portion of total system value that does not correspond to the value that the facts show can fairly be attributed to it. See *Southern Ry.* v. *Kentucky*, 274 U.S. 76 (1927). Both *Fargo* v. *Hart*, 193 U.S. 490 (1904), and *Wallace* v. *Hines*, 253

U.S. 66 (1920), were cases in which the subject or the measure of the tax was the capital value of the entire railroad. The fact that enhancement of value arising from the organic unity of an interstate enterprise was thus incorporated in the measure of value, contrary to the Missouri practice here, did not prevent the Court from holding that mileage proportions produced unconstitutional results. As the Court said in *Fargo* v. *Hart, supra* at 499-500:

> "The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. . . .
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> "It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense."

The fact that *Fargo* v. *Hart* and *Wallace* v. *Hines* both involved mileage proportions that were applied to the whole value of the taxpayer makes them *a fortiori* precedents for the present case. Greater leeway may be allowable in the application of formulas that are designed to allocate entire enterprise values. In the first place, these values include intangibles, which by

their very nature are more difficult to allocate than tangibles. See *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365 (1940); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962). Secondly, a mileage proportion for measuring the percentage of the total property of a railroad or telegraph company within a state embodies a direct measure of value for a substantial part of the company's in-state assets, *i.e.*, its roadbed or telegraph lines. There is, on the other hand, no such direct measure of value when only rolling stock is allocated by means of a road or track mileage proportion.

Moreover, it is as clear in this case as it was in *Fargo* v. *Hart* and *Wallace* v. *Hines* that the out-of-state values that the court below said "enhanced" Missouri values did not affect those values. The Norfolk & Western's coal-hauling equipment, accounting for the greatest part of its rolling stock value, operated independently of the operations of the Wabash lines in Missouri. The rule is that "no property of . . . an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace* v. *Hines, supra* at 69. It is no answer to speculate, as the court below did, upon the motives of the parties to the lease. (A. 83-84). No doubt it was thought that a stronger enterprise would result from the lease and related transactions, but an enterprise may be stronger for greater diversity rather than for any integration of operations. The size and resources of the Norfolk & Western, divorced from the Missouri operations, were not relevant to the value of what was used in those operations.

IV. THE OTHER GROUNDS ASSIGNED BY THE COURT BELOW FOR SUSTAINING THE ASSESSMENT ARE LACKING IN SUBSTANCE.

A. The Assessment Was "Grossly Excessive" by Any Rational Standard.

The court below and appellees here defend what was done to the Norfolk & Western on the further ground that the exaggeration of the value of its Missouri rolling stock by the Tax Commission is not so "grossly excessive" as to call for invalidation.

Where what is involved is not "a mere case of overvaluation, but . . . an assessment made upon unconstitutional principles," *Fargo* v. *Hart,* 193 U.S. 490, 502 (1904), not much is to be gained by comparisons with the discrepancies in value shown by the facts of other cases. We submit, however, that the requirement of showing a "burden on the taxpayer grossly in excess of the results of a more accurate apportionment," *Norfolk & Western Ry.* v. *North Carolina ex rel. Maxwell,* 297 U.S. 682, 685 (1936), is satisfied where the disparity between the amount assessed and the amount resulting from "a more accurate apportionment" approaches 3 to 1 as it does here. Such a discrepancy is far more than what must be accepted by taxpayers in recognition of the fact that an allocation "can never be made for a unitary business with more than approximate correctness." *Id.* at 684.

The Missouri Supreme Court has tried to belittle the excessiveness of the assessment of the Norfolk & Western's rolling stock by a comparison that, upon analysis, would be relevant only if Missouri were permitted by the Constitution to tax values outside its borders. In its opinion the court said that the depreciated value of all Wabash rolling stock is $82,000,000

as compared with $241,000,000 for all Norfolk & Western rolling stock and that if a mileage proportion had been taken of the Wabash rolling stock alone (based on the Wabash's Missouri and system mileage), the assessment would have been $10,103,340.[15] The court concluded from this venture into arithmetic that "certainly, no unconstitutional disproportion is revealed in an assessment of $19,981,757 against a total valuation of $241,255,643, when compared to $10,103,340 assessed against $82,456,813. . . ." (A. 84-85). To the contrary. If, as was the case here, the values represented in the difference between $82,000,000 and $241,000,000 were substantially all outside Missouri and contributed nothing to the value of what was within the state the disproportion in assessments is almost exactly 100 per cent and is clearly grave enough to amount to an unconstitutional deprivation, burden and discrimination.

B. The Tax Commission Took No Factors Other Than the Mileage Formula Into Account in Making Its Assessment and Did Not Consider Appellants' Evidence in Any Meaningful Way.

The State Tax Commission was as explicit as it is possible to be in saying that when it assessed the Norfolk & Western's rolling stock it followed precisely the steps that it followed in the case of every other interstate railroad. It said that the statute laying down the assessment formula "provides a fair and reasonable method to determine that amount of rolling stock of *any* railroad which extends beyond the limits of the

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[15] The Missouri court compared the depreciated value of the Wabash rolling stock with the depreciated *and equalized* value of the Norfolk & Western rolling stock. Thus, the court understated its argument. However, the court's error is of no consequence here because its argument is completely specious.

State which may be taxed by this State . . . ." (A. 57). (Emphasis added). The Commission said further that "to apply this formula to some railroads and not to others would be arbitrary and discriminatory." (*Ibid.*)

The Commission used the mileage proportion to make its initial assessment of $19,981,757 and adhered to the initial assessment after receiving appellants' evidence, so that its final assessment was, to the dollar, $19,981,757. Concerning appellants' evidence, the Commission said only that it did not show "that the valuation placed upon the rolling stock . . . was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of [appellants], nor . . . that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner." (A. 57).

When one bears in mind what the Commission thus said and did, it is plain that there is no substance whatever to the suggestion of the court below that the Commission may have considered factors other than the mileage formula because "a formula alone was not the only item available to the commission's consideration." (A. 86).

Appellants' evidence tended to show that the mileage proportion was unconstitutional in its application. If there were considerations other than the mileage ratio that affected the Commission's judgment, appellants were not apprised of them, and the Commission did not think it worthwhile to recite them in its "Findings of Fact, Conclusions of Law and Decision." That document is inconsistent with any notion that the Commission thought that some other factor supported its decision. As we have said, the Commission stated in its

conclusions of law that the mileage proportion constituted "a fair and reasonable method" of determining the amount of rolling stock of "any" interstate railroad that Missouri might tax; there was, as far as the Commission was concerned, no need for additional support for use of the proportion or the result it produced in the case of the Norfolk & Western or any other road.

In their presentation to the Tax Commission the appellants carried their "distinct burden of showing by 'clear and cogent evidence' that . . . [the Missouri apportionment device] results in extraterritorial values being taxed." *Butler Bros.* v. *McColgan*, 315 U.S. 501, 507 (1942). It is fanciful to suggest, as the Missouri Supreme Court did, that because the Tax Commission in its decision noted that it is "the sole judge of the credibility of witnesses appearing before it" (A. 55) the Commission may have disbelieved appellants' evidence. (A. 85-86). The evidence was statistical and subject to precise verification. It was of the same order as the appellants' data that the Commission did rely upon in making its assessment. Appellants' witnesses were scarcely cross-questioned, and there was no countervailing evidence. In short, there was no basis on which the Commission could have disbelieved the evidence. Compare *Konigsberg* v. *State Bar Ass'n*, 353 U.S. 252 (1957). Instead, the record is quite clear that the Commission disregarded the evidence because it thought the evidence, for the most part at least, irrelevant to what the Commission conceived to be its duty of mechanically applying the mileage proportion. (A. 9-10, 11-13, 25, 36-37, 39, 42, 56-57).

This Court, then, should take the Tax Commission at its word as to what it did in this case and ignore as

after-the-fact rationalization that part of the opinion below in which the court purports to deal with the matters we have just discussed. In so doing, this Court would be showing no lack of proper deference to a state court's view of the proceedings of a state agency. Rather it would be pursuing its duty to see through to the truth of things where constitutional rights are at issue. See *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 658-59 (1945); *Great Northern Ry.* v. *Washington*, 300 U.S. 154, 165-68 (1937). The truth here is that a mileage proportion assessment was made and then confirmed without modification in the face of clear and cogent evidence that the result was to tax property that Missouri was not constitutionally competent to tax.

V. THE EFFECT OF THE DECISION BELOW IS TO SUBJECT THE NORFOLK & WESTERN TO THE RISK OF DOUBLE TAXATION; NO PROBLEMS OF TAX OR JUDICIAL ADMINISTRATION WOULD BE CREATED BY REVERSAL OF THAT DECISION.

One final justification for the result below has been offered by the appellees in their motion to dismiss or affirm: If the Norfolk & Western were subject to assessment according to a mileage proportion in every state in which it operated, the net effect would be that no more than 100 per cent of the value of its rolling stock would be assessed for the purpose of ad valorem taxation. On such a view, even though the states might have complaints among themselves about their shares of the total assessment, the Norfolk & Western would have no complaint. The same thought was expressed many years ago by this Court in the *Pullman Car* case when it said that, if the mileage proportion method there used "were adopted by all the States through which these cars ran, the company would be assessed upon the

whole value of its capital stock, and no more." 141 U. S. at 26.

Of course what the Court said was true, but the difficulty is that over the years the states have seen that a mileage proportion taken by itself is not the fairest or most accurate means of arriving at the value of a carrier's rolling stock within a state. As long ago as 1923 a committee of the National Tax Association reported that single-track mileage, which is the basis of the Missouri formula, "is not a satisfactory index of property distribution because it ignores terminals, nor is it a fair index of business done, because it ignores density of traffic." *Taxation of Public Utilities,* in National Tax Ass'n, *Proceedings of the Sixteenth Annual Conference on Taxation* 403, 407 (1924). Another kind of index, all-track mileage, which takes account of double tracks and sidings, was said by the committee "to overcome both of these shortcomings to a considerable degree," but still to have weaknesses and probably to be inferior to some other single element indices. *Ibid.* The committee recommended a composite multi-element formula because "no one method is a safe guide to distribution." The composite was to include all-track mileage, car mileage, physical valuation, traffic units and gross earnings. *Id.* at 410.

In the years since 1923 the mileage ratio has not achieved any greater favor with those expert in the field. In 1948 a state tax official said that "no one seriously contends that road mileage is a good factor, though strangely enough it is used in nine states. Its defects are so obvious that it deserves no further discussion." Main-track mileage, the official said, was a little better but still "very unreliable," and he criticized all-track mileage too. Chapman, *The "Operat-*

ing-Characteristics Method" of Interstate Allocation of Railroad Property, in National Tax Ass'n, *Proceedings of the Forty-First Annual Conference on Taxation* 439, 443-44 (1948). See also Faricy, *Importation of Values Through the Use of Unit Rule Formulae,* in National Tax Ass'n, *Proceedings of the Thirtieth Annual Conference on Taxation* 251, 255-56 (1938).

Of the states in which the Norfolk & Western operates only Missouri, North Carolina and Ohio have adopted the method of allocating rolling stock value solely on a road mileage proportion basis.[16] Among the other states, West Virginia, for example, where much of the Norfolk & Western's coal traffic and equipment is centered, allocates values to itself for property tax purposes on the basis of a formula that takes account of traffic density by using car and locomotive miles and ton and passenger miles.[17] Most other states, including those in which the Norfolk & Western operates, have adopted formulas that reflect something other than mere mileage.[18]

The purpose of any formula that looks solely to the valuation of locomotives and cars is to measure the fair value of the amount of railroad rolling stock that is actually within a state. This Court has regarded the

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[16] G.S.N. Car. § 105-366; Ohio G.C. § 5445, P.O.R.C.A. § 5727.4.

[17] W. Va. Code Ann., Ch. 11, art. 6 §§ 1-2, as implemented by administrators of the taxing system in letters to the railroads concerned.

[18] See, *e.g.*, Illinois—Laws 1939, p. 886, § 84, S.H.A. ch. 120, § 565; Indiana—Acts 1949, ch. 34, § 8, p. 84, B.I.S.A. Tit. 64, § 1808; Iowa—Code of Iowa (1962) § 434.15, as amended by S.B. 772, Laws 1967; Kentucky—K.R.S. § 136.160; Michigan—CL 1948, § 207.9, M.S.A. ch. 60, § 7.259; Nebraska—N.R.R.S. 1943 §§ 77-603, -604; Virginia—Code of Va. 1950 § 58-524(5).

average number of units of rolling stock present in a state as the obvious and natural basis on which to say what is in a state for tax purposes. *Central R.R.* v. *Pennsylvania*, 370 U.S. 607, 613-14 (1962); *Johnson Oil Ref. Co.* v. *Oklahoma ex rel. Mitchell*, 290 U.S. 158, 162-63 (1933). A formula that yields a figure approximating the value of such an average number of units is fair and constitutional. But there is a risk of double taxation when one state uses a formula that attributes to it values equivalent to much more than those of the average number of units present in the state. This risk is heightened by the Court's recent decision in *Central R.R.* v. *Pennsylvania, supra*. The Court there reaffirmed the rule that a state of domicile may constitutionally tax the entire value of a carrier's fleet, other than the value attributable to units shown to be habitually present in some particular other state and thus subject to taxation by it.[19] The values represented by the Missouri assessment in this case bear no reasonable relationship to the value of the units of rolling stock habitually in Missouri and thus would not, we submit, need to be taken into account by the state of domicile in making its assessment. See 370 U.S. at 611-12, 614.

In addition to producing a risk of double taxation, the fact that Missouri is atypical in its absolute reliance upon relative road mileage has another important consequence. A decision by this Court in favor of the Norfolk & Western would not have the effect of bringing into question the assessment practices of any significant number of states. But acceding to Missouri's suggestion that all would be well if other states retreated to Missouri's out-moded system would have such an effect. Most states, as we have indicated,

[19] Compare Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

use more sophisticated indices, more apt to produce a fair measure of actual values within the state.

Moreover, a decision for the appellants need not cause administrative problems even for Missouri. On its face the Missouri statute appears to establish the mileage proportion only as a maximum limitation on the value of rolling stock that can be assessed to an interstate railroad and to permit the consideration of other factors. The court below said as much in its opinion, even though what it said was inaccurate as a description of what the Tax Commission had done in this case. (A. 85-86). That point aside, however, this Court has not hesitated to inquire into the validity of particular assessments under statutes whose general validity has been sustained and to enjoin such assessments when they represented unconstitutional applications of generally valid statutes, as in *Fargo* v. *Hart*, 193 U.S. 490 (1904). Cf. *Norfolk & Western Ry.* v. *North Carolina ex rel. Maxwell*, 297 U.S. 682, 685 (1936), a mileage proportion case, where the Court said that "a formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions." Such cases make it plain that there is no force in the Tax Commission's assertion that it must apply the mileage proportion uniformly to all railroads to avoid being arbitrary or discriminatory. To the contrary, the rule laid down by this Court is that an agency like the Tax Commission must adjust the result of application of a mileage proportion where that result is an assessment that appropriates significant out-of-state values to the taxing state.

The burden is clearly upon a railroad to demonstrate that the application of the mileage proportion has re-

sulted in over-assessment. Only upon the production of substantial—indeed "clear and cogent"—evidence of this fact does the state have to abandon its formula and have regard to the railroad's evidence. Compare *Adams Express Co.* v. *Ohio State Auditor*, 165 U.S. 194, 227 (1897). The number of instances in which such a showing could be made by the roads is small. And even where such a showing is made, a state will not be forced to "count cars." Although in the nature of things much of appellants' evidence went to the valuation of actual cars and locomotives in Missouri and although, as the court below noted, "use of the average number of units in the state has been held to be a fair method of assessment of interstate rolling stock" (A. 82), it is not a compelled method. Upon a setting aside of its mechanical application of the mileage proportion, the Tax Commission's obligation would be to evaluate the appellants' evidence and use the data therein in some reasonable manner to arrive at a just valuation of Missouri rolling stock.

CONCLUSION

Missouri has assessed and thereby attempted to tax property of the Norfolk & Western outside of its borders. In so doing it has discriminated against interstate railroads with low concentrations of rolling stock in Missouri. Its action is plainly unconstitutional under the commerce clause and the due process clause.

The judgment below sustaining this action should therefore be reversed.

Respectfully submitted,

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

CHARLES L. BACON
FREDERICK BEIHL
915 Grand Avenue
Kansas City, Missouri 64106

JAMES E. CARR
MELVIN J. STROUSE
DAVID R. GOODE
Norfolk & Western Railway Company
Roanoke, Virginia

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING
SHOOK, HARDY, OTTMAN, MITCHELL & BACON
CHRISTOPHER S. BOND

NOVEMBER 1967

STATUTES

STATUTES

Vernon's Annotated Missouri Statutes (1952)

§ 138.420. Power of original assessment—notification—modification of decision

1. The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms.

2. After original assessments of the state tax commission have been completed each corporation, person or public utility interested therein shall be promptly notified of the action of the commission and shall have the right to apply for a rehearing. The commission shall grant and hold such rehearing and fix the date thereof.

3. If, after such rehearing and a consideration of the facts, the commission shall be of the opinion that the original decision or any part thereof should be changed, the commission may change or modify the same and such assessed valuations as are finally determined shall be certified to the clerks of the several county courts and to the assessor in St. Louis city at the same time that valuations of real and tangible personal property are returned.

4. Said commission shall also have all power of original assessment of real and tangible property in the possession of any assessing officer on January first. (L. 1945 p. 1805 § 15, A.L. 1947 V. I, p. 548)

§ 147.010 Annual franchise tax—exceptions

1. For the taxable year of 1943 and thereafter every corporation of this state organized under or subject to chapter 351, RSMo 1949 or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus, or if the outstanding shares of such corporation or any part thereof

consist of shares without par value, then, in that event, for the purpose herein contained such shares shall be considered as having a value of five dollars per share unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus. If such corporation employs a part of its outsanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding shares and surplus employed in this state, and for the purposes of this chapter such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.

2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo 1949 or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of five dollars per share, unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this chapter such corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located.

3. Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their premium receipts in this state; provided, bank deposits shall be considered as funds of the individual depositor, left for

safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this chapter. (L. 1943 p. 410 § 135)

§ 151.010. What railroads are taxable

All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all real property, tangible personal property, and intangible personal property, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation, and taxes levied on real property, and tangible personal property, shall be levied in the manner herein set forth, and the taxes on intangible personal property shall be levied and collected in the manner otherwise provided by law. (L. 1945 p. 1825 §2)

§ 151.020. Railroad companies to make annual statement to state tax commission—penalty

1. On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof.

2. In case the report, from any railroad, required by this section, is not received by May first of the year in which it is due the state tax commission may, at its discretion, increase by four per cent the total assessed valuation of the railroad company and certify such increase to the director of revenue for collection. (L. 1945 p. 1825 § 3)

§ 151.060. Commission to assess, adjust and equalize valuation—hearings

1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020.

2. The commission shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, or tangible property belonging to any railroad companies in this state of the kind specified in section 151.020, upon which no returns have been made, which may be otherwise known to them, as they deem just and right.

3. In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall ex-

tend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company. (L. 1945 p. 1825 § 7)